

STATE OF MICHIGAN
COURT OF APPEALS

K.M. YOUNG CORPORATION,

Plaintiff-Appellee,

v

CHARTER TOWNSHIP OF ANN ARBOR,

Defendant-Appellant.

UNPUBLISHED

March 16, 2004

No. 242938

Washtenaw Circuit Court

LC Nos. 01-000286-AZ

01-000794-AV

Before: Sawyer, P.J., and Bandstra and Smolenski, JJ.

PER CURIAM.

Defendant Ann Arbor Township appeals by leave granted the trial court's order reversing the decision of the Ann Arbor Township Board denying plaintiff's request for a conditional use permit. We reverse.

I. Basic Facts and Procedural History

Plaintiff K.M. Young Corporation seeks to construct and operate a 250-student Montessori school on a 7.78 acre parcel of land in Ann Arbor Township. The land at issue is currently zoned for suburban residential use; however, it is not disputed that primary schools such as that proposed by plaintiff are permissible in such districts as a "conditional use."

As defined by the township's zoning ordinance a "conditional use" is one that, although "entirely appropriate and not essentially incompatible with the uses permitted by right in a zoning district," may not be wholly appropriate or compatible "at every or any location therein, or without restrictions or conditions being imposed by reason of special problems presented by the use or its particular location in relation to neighboring properties" Ann Arbor Township Zoning Ordinance, Article XXI, § 21.01. Given the perceived potential for such uses to be problematic, the ordinance "requires approval as to location of all uses listed in the several zoning districts as conditional uses," and also provides both "procedures and standards to be followed in granting permits to allow such uses." *Id.* With respect to the standards required for issuance of such a permit, § 21.08 of the township zoning ordinance requires that the proposed conditional use:

A. Will be harmonious, and in accordance with the objectives, intent, and purposes of this Ordinance.

B. Will be compatible with the natural environment and existing and future land uses in the vicinity.

C. Will be compatible with the General Development Plan.

D. Will be served adequately by essential public facilities and services, such as highways, streets, police and fire protection, drainage ways and structures, refuse disposal, or that the persons or agencies responsible for the establishment of the proposed use shall be able to provide adequately any such services.

E. Will not be detrimental, hazardous, or disturbing to existing or future neighboring uses, persons, property or the public welfare.

F. Will not create additional requirements at public cost for public facilities and services that will be detrimental to the economic welfare of the community. [Ann Arbor Township Zoning Ordinance, Article XXI, § 21.08]

The ordinance further provides that “[i]f compliance with the procedures and standards set forth [therein] are found, then the right to a conditional use permit shall exist, subject to specific safeguarding conditions as may be imposed by reason of the nature, location, and external effect of such use.” Ann Arbor Township Zoning Ordinance, Article XXI, § 21.01.

In June 2000, plaintiff began the process for approval of the proposed conditional use by filing with the township clerk an application for a conditional use permit. As required by the township zoning ordinance, plaintiff’s application was first presented to the Ann Arbor Township Planning Commission for review and recommendation of action to the Ann Arbor Township Board, which holds ultimate authority for approval of all conditional uses. See Ann Arbor Township Zoning Ordinance, Article XXI, §§ 21.06, 21.07. Plaintiff also sought planning commission review and approval of the natural feature aspects of a preliminary site plan for the school.¹ However, following a public hearing conducted during its November 8, 2000 regular meeting, the commission adopted a resolution to recommend to the township board that plaintiff’s request for a conditional use permit be denied.

Although no transcript of the public hearing is available, the minutes of the commission’s November 8, 2000 meeting reflect the commission’s concern that a 250-student school was a use “too intense” for the 7.78 acre parcel, which abuts a residential neighborhood on two sides. The commission members also noted that “all” of the surrounding neighbors were opposed to the plan and, accordingly, concluded that a conditional use permit should not be issued on the ground that the proposed school would constitute a disturbance to existing neighboring uses, contrary to the requirements for issuance of a conditional use permit as set forth in § 21.08 of the township’s zoning ordinance. In light of this conclusion, the commission also resolved to table

¹ Pursuant to § 22.01 of the township zoning ordinance, the planning commission has ultimate authority to approve or deny both preliminary and final site plans, including the natural features aspect of those plans.

plaintiff's request for approval of its site plan, pending a decision on the propriety of a conditional use permit by the township board.²

Plaintiff's application for a conditional use permit thereafter came before the township board at its regular meeting held on January 15, 2001. At that meeting, plaintiff presented the board with an abundance of technical information concerning the proposed school, including projected traffic flows and favorable reviews of such matters as the drainage, wetland, and natural features aspects of the project. The board's focus during the meeting, however, was on the traffic flow problems outlined in a report prepared by a private consultant hired by plaintiff, as well as the size of the proposed school in relation to the parcel,³ and the effect on neighboring parcels of the increased traffic and congestion that the school was likely to create. The board further voiced concern regarding whether the proposed school met the objectives of the township's general development plan to preserve the township's rural character and protect existing residents from new development.

A motion to table consideration of plaintiff's conditional use permit in order to allow the township attorney to draft a resolution to deny the permit based on the board's findings "as discussed" by the board members at the January 15, 2001 was carried. On February 26, 2001, the board unanimously adopted a written resolution denying plaintiff's application for a conditional use permit for the following reasons:

1.1 The use is not harmonious with the objectives, intent and purposes of the zoning ordinance. The intent of the zoning ordinance is to divide unincorporated areas into appropriate zoning districts to limit overcrowding in the use of the land, limit congestion of population and transportation systems, limit overuse of public facilities and to promote the general health, safety and general welfare of residents. The Applicant's proposed use of the site for a school of this size and type would create congestion in the transportation system and result in an overcrowding of the area. The proposed use is too intense for the size of the parcel based on recognized state standards, and based on the proximity of neighboring residences, and the long access drive along the property line from Dixboro Road.

1.2 The use is not compatible with the natural environment and existing and future land uses in the vicinity. The existing and future land use is low density

² Arguing that the planning commission was required by the township zoning ordinance to either approve or deny its site plan regardless of its recommendation regarding issuance of a conditional use permit, plaintiff requested that the issue be placed on the agenda of the commission's January 8, 2001 meeting. Reasoning that its recommendation to deny plaintiff's application for a conditional use permit was based on the failure of the proposed use to meet the requirements of § 21.08 of the township zoning ordinance, the commission determined at that meeting that the site plan and associated natural features permit must also be denied.

³ The board's concern over the size of the school in relation to the parcel stemmed, at least in part, from state guidelines under which a parcel size of approximately twelve and one-half acres was recommended for a 250-student school.

residential based on the current zoning and master plan. Use of the site for a school of this size would not be compatible with the existing and future residential use in view of the long access road, and the proximity of neighboring residences.

1.3 The proposed use is incompatible with the General Development Plan. In particular, the proposed use as a school of this size on this parcel does not comply with the objective of the plan to preserve the Township's rural character, to protect existing residential uses from the adverse impact of new development, and the designation of the area for a low-density urban residential use.

1.4 The proposed use will be detrimental and disturbing to existing and future neighboring uses. Numerous concerns raised by neighboring property owners at the public hearing and in writing demonstrate the detrimental impact of this intense use on the neighboring owners. These detrimental effects include the disturbance of up to 200 cars using the long access drive adjacent to the residence for drop off and pick up of students, fragmentation of the rural residential neighborhood, unsafe traffic egress and ingress and excessive encroachment on the rural residential character of surrounding residences, and other safety concerns.

Plaintiff subsequently appealed the board's decision to deny its application for a conditional use permit to the circuit court, arguing that the decision was contrary to the "uncontroverted evidence," which established all requirements for issuance of the permit, and that therefore it was entitled to approval of its application as a matter of right, subject to reasonable conditions. The circuit court agreed and, in a written opinion and order entered on July 16, 2002, reversed the board's decision denying the conditional use permit.

In its opinion the court found the township board's conclusion that the proposed use "would create congestions in the transportation system and result in over-crowding of the area" was not supported by the evidence:

There is no substantial evidence in the record to support such a conclusion. The only evidence that existed as to the impact on the transportation system was a letter from the County Road Commission that found that the proposed driveway would not pose a conflict but recommended an improvement in the roadway for a turning lane. If such an improvement is necessary, it is governed by paragraph F of Section 21.08 relating to improvements at public cost. However, the Township never attempted to safeguard against such a public cost by requiring the applicant to pay for such an improvement.

The court also found the board's reliance on state standards regarding school size in relation to parcel acreage to be inappropriate because such standards "were simply recommended guidelines for the State to use in determining whether it would license a school to operate," and "[i]t is not for the Township, in the course of deciding a land use issue, to determine whether a proposed school meets State educational guidelines." The court also rejected the board's conclusions that use of the site for a school of this size (1) would not be compatible with existing and future residential use, (2) was incompatible with the general development plan because it

does not comply with the objective of the plan to preserve the township's rural character and protect existing residential uses from the impact of new development, and (3) would be detrimental to existing and future neighboring uses:

All of these conclusions are inappropriate under the Township's Zoning Ordinance. By prescribing a school as a conditional use in this residential district, the Township has already determined that a use of this type is appropriate and compatible in this residential area. If the Township wishes to find that school uses are not compatible with this residential area then it may attempt to amend the Ordinance to prohibit them. However, under the current Ordinance, the Board's responsibility is to develop safeguards and conditions that will allow such a school use in this district. The fact that the existing neighbors may object to a particular use does not make that use incompatible where the zoning ordinance has determined that such uses are compatible if properly conditioned.

Accordingly, the court concluded that the board was obligated to issue the requested conditional use permit, subject to "safeguarding conditions that will allow such a permitted use." On appeal, the township argues that the circuit court erred in reaching this conclusion and reversing the board's decision to deny plaintiff's request for a conditional use permit.⁴

II. Analysis

A. Standard of Review

The decision to grant or deny a special or conditional use permit is an administrative act subject to appellate review by the circuit court to determine whether the decision was "authorized by law; and, in cases in which a hearing is required, whether the same [is] supported

⁴ The township also argues that, given the failure of the parties to explore all potential uses to which the land at issue could permissibly be put, the circuit court was without subject matter jurisdiction to hear and decide an appeal by plaintiff because the matter was not ripe. However, we agree with plaintiff that "where[, as here,] a township zoning ordinance does not provide for review of a request for a special land-use permit by a zoning board of appeals, the township board's decision is final and subject to appellate review by the circuit court pursuant to Const 1963, art 6, § 28." See *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195, 200; 550 NW2d 867 (1996). The cases relied on by the township in arguing to the contrary are inapposite, each having involved the more intricate question whether the zoning action at issue constituted a regulatory taking. See *MacDonald, Sommer & Frates v Yolo Co*, 477 US 340, 351; 106 S Ct 2561; 91 L Ed 2d 285 (1986) (judicial review of regulatory takings claim requires "final, definitive position regarding how it will apply the regulations at issue to the particular land in question"); see also *Paragon Properties Co v City of Novi*, 452 Mich 568, 580; 550 NW2d 772 (1996) (constitutional validity of a zoning ordinance "as applied" requires "information regarding the potential uses of the property that might have been permitted"). In contrast, the question presented both here and in the circuit court is merely whether the township board's decision to deny the proposed conditional use on the ground that such use, as proposed, does not comply with the requirements of township zoning ordinance, is supported by the evidence.

by competent, material and substantial evidence on the whole record.” *Carleton Sportsman’s Club v Exeter Twp*, 217 Mich App 195, 201; 550 NW2d 867 (1996), quoting Const 1963, art 6, § 28. “‘Substantial evidence’ is evidence which a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance.” *Dowerek v Oxford Charter Twp*, 233 Mich App 62, 72; 592 NW2d 724 (1998).

When reviewing a lower court’s examination of administrative action, this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the factual findings, a standard of review “indistinguishable from the clearly erroneous standard of review.” *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). “As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made.” *Id.* at 235.

B. Application

The township argues that the trial court misapplied the competent, material and substantial evidence standard of review to the board’s decision to deny plaintiff’s application for a conditional use permit. We agree.

Initially, we reject the circuit court’s conclusion that “[b]y prescribing a school as a conditional use in [a suburban] residential district, the Township has already determined that a use of this type is appropriate and compatible in this residential district,” and that, therefore, the township board was without discretion to deny such use without amendment of the township ordinance. As indicated above, although identifying a primary school as a conditional use “entirely appropriate and not essentially incompatible with the uses permitted by right” in such districts, the ordinance also recognizes that such a use may not be wholly appropriate or compatible “at every or any location therein,” and thus requires “approval [by the township board] as to location of all uses listed in the several zoning districts as conditional uses.” Ann Arbor Township Zoning Ordinance, Article XXI, § 21.01, 21.02. A plain reading of this language leads to a conclusion contrary to that reached by the circuit court; namely, that the township board has discretion to determine whether a prescribed conditional use, although permissible, is nonetheless inappropriate and incompatible in a given location. Our review of the record created below reveals that the board exercised such discretion in denying the permit at issue here, and that it did so in reliance on the competent, material, and substantial evidence necessary to sustain that denial.

The record indicates that each of the board’s four bases for denying plaintiff’s application stemmed, in essence, from one main concern – the size of the proposed project in relation to both the parcel on which it was to be located and the existing and future uses of the surrounding lands. The record also indicates that substantial evidence to support this concern was presented to the board.

For instance, although rejected by the circuit court as an inappropriate consideration, the student-to-square-footage guidelines recommended by the state certainly have some relevancy to the issue whether the use proposed here is “too intense” for the parcel at issue, as determined by the township board in its resolution to deny the proposed conditional use.⁵ Moreover, the guidelines respecting the size of a school in relation to a parcel were not the sole basis for the board’s conclusion that the proposed use was simply too intense for this particular parcel. The board further took into account the proximity of the school (based on the plans submitted to the board by plaintiff) to neighboring residences, and the adverse effects of the long access drive along the property line separating the school from those residences. With respect to such effects, plaintiff’s representative conceded before the board that the access drive could ultimately be traversed each day by up to 250 cars. There was also evidence that such traffic would be “disturbing to existing and future neighboring uses,” as determined by the board. Indeed, numerous letters as well as a petition containing the signatures of approximately fifty neighboring property owners opposing the proposed school were presented to the board. Many of these owners indicated a desire to see the parcel preserved for residential use and expressed concern over the increase in traffic congestion associated with the proposed school.⁶

With respect to such congestion and associated safety concerns, a traffic flow report authored by a consultant hired by plaintiff and relied on by the board projected that, during the peak morning hours, the level of service required for westerly egress from the proposed school would result in a queue of approximately thirty-seven vehicles waiting for a period of nearly five minutes each to exit the school’s drive. The report further indicated that such a lengthy waiting period may prompt “some drivers to select smaller gaps” in the traffic flow, a conclusion cited by the board at its July 15, 2001 meeting as a threat to safety along the roadway fronting the proposed school and neighboring residential areas.

Evidence that the proposed use was not, at least at this particular location, compatible with the township’s general development plans is also found in the record. As cited by the board in its resolution denying plaintiff’s application for a conditional use permit, the area in which

⁵ According to these guidelines, the parcel at issue is approximately five acres too small, or less than two-thirds the recommended size, for a school of the size proposed by plaintiff. Moreover, while plaintiff presented evidence that the proposed school was no more disproportionate in relation to acreage than many of the area public schools, one board member indicated that the majority of the schools cited by plaintiff were located in an urban setting, whereas the land at issue here is generally rural, and that many of those schools are now considered to be “over capacity.”

⁶ Contrary to the circuit court’s conclusion, public opposition to zoning issues is a relevant and proper consideration for a zoning authority. See, e.g., *A & B Enterprises v Madison Twp*, 197 Mich App 160, 164; 494 NW2d 761 (1992) (the public notice and hearing requirement of the Township Rural Zoning Act “would be defeated if a township board could not consider public opposition to a proposed rezoning classification”); see also *Davenport v City of Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 407-408; 534 NW2d 143 (1995) (neighbor opposition to proposed zoning is relevant to the issue whether the project proposed is “harmonious” with existing land use).

plaintiff seeks to construct the proposed school has long been designated by the township's General Development Plan for "low-density urban residential use at a density of 1 to 2 [units per] acre." In contrast, evidence submitted to the board indicates that the use proposed by plaintiff encompasses a commercial venture that includes a 21,000 square foot building and parking facilities that can accommodate up to seventy-seven vehicles. This evidence supports the board's determination that the proposed project does not comply with the plan's stated objective to preserve the rural character of the township, and that the proposed use would both fragment and encroach upon the existing rural residential neighborhoods.

III. Conclusion

While we do not dispute the intrinsic worth of the project proposed by plaintiff, it is not for this Court or any other to determine the merits of such endeavors. As noted by our Supreme Court in *Altman v Meridian Twp*, 439 Mich 623, 642; 487 NW2d 155 (1992):

The courts cannot sit in judgment on the precise merits of the myriad discretionary and factbound decisions reached every day by democratically elected local governing bodies in the area of zoning and development. We can only review whether the local governing bodies have discharged their powers in a manner consistent with applicable law.

Applying this principle, we find no basis for concluding that the township board has done other than exercise the discretion afforded it by the zoning ordinance in determining whether the requirements for a conditional use permit have been met.

The circuit court clearly erred in determining otherwise. Accordingly, we reverse the circuit court's order and reinstate the board's decision denying plaintiff's application for a conditional use permit.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Michael R. Smolenski